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In the Supreme Court of the United States

OCTOBER TERM, 1976

PUYALLUP TRIBE, INC., AND
RAMONA BENNETT, PETITIONERS

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted pursuant to the Court's invitation in its order of November 29, 1976.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington (Pet. App. B-1 to B-66) is reported at 86 Wash. 2d 664, 548 P.2d 1058. The opinion of the Superior Court of the State of Washington in and for Pierce County (Pet. App. C-1 to C-59), together with findings of fact and conclusions of law (Pet. App. D-1 to D-24), is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Washington became final on June 25, 1976 (Pet. App. B-67 and B-68). The petition for a writ of certiorari was filed on September 22, 1976, and granted on November 29, 1976. The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED [1]

Whether the Washington state courts may limit the right of the Puyallup Indian Tribe to fish for steelhead trout within the boundaries of the Puyallup Indian Reservation.

TREATY INVOLVED

The Treaty of Medicine Creek, 10 Stat. 1132, December 26, 1854, is set forth in pertinent part at 1a-2a of the Attachment to petitioners' brief.

STATEMENT

In 1963 the Department of Game and the Department of Fisheries of the State of Washington brought an action in state superior court against the Puyallup Tribe and various individual tribal members, claiming that they were subject to state fishing laws pro-

[1] Although the Washington Supreme Court decided several issues relating to the fishing rights of the Puyallup Indians, the petition for a writ of certiorari filed by the Puyallup Tribe raised only the issue whether the state courts may exercise control over the right of the Puyallup Tribe to fish for steelhead trout on its Reservation.

hibiting net fishing at their usual and accustomed places outside the Reservation.

The trial court held that the Puyallup Tribe no longer existed as an entity; that its members therefore no longer possessed treaty fishing rights; and that there was no longer a Puyallup Reservation. The court also held that it was reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens.

On appeal, the Washington Supreme Court held that the trial court lacked jurisdiction to determine that the Tribe had been terminated; that, although there was no longer a Puyallup Reservation, the tribal members continued to have a right to fish at usual and accustomed grounds; and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fisheries. Under the circumstances, the court concluded, the injunction entered by the trial court to limit Indian fishing was too broad. The Washington Supreme Court therefore set aside the judgment and remanded the cause. *Department of Game* v. *Puyallup Tribe, Inc.*, 70 Wash. 2d 245, 422 P.2d 754.

This Court, on certiorari to the Washington Supreme Court, affirmed. *Puyallup Tribe* v. *Department of Game*, 391 U.S. 392 (*Puyallup I*). The Court held that, although the State could not qualify the Indians' treaty right to fish "at all usual and accustomed places," the State could regulate the manner of fishing and the like "in the interest of con-

servation, provided the regulation meets appropriate standards and does not discriminate against the Indians." 391 U.S. at 398. The Court did not decide whether the State's prohibition against the use of set nets in fresh water was "reasonable and necessary" for purposes of conservation. This was an issue that the State Supreme Court had left for the trial court on remand. *Id.* at 401-402.

Prior to the trial on remand, the Department of Fisheries promulgated salmon regulations limiting commercial net fishing but permitting Indian net fishing for salmon in the Puyallup River. The Department of Game, however, refused to recognize a treaty right to a commercial steelhead fishery and continued its total prohibition on net fishing for steelhead trout. After a hearing, the trial court dissolved its prior injunction on the grounds that the Department of Game had not met its burden of showing that its regulations were reasonable and necessary for the conservation of the fishery and that the Department had made no showing of irreparable injury. On appeal, the Washington Supreme Court, in *Department of Game* v. *Puyallup Tribe, Inc.*, 80 Wash. 2d 561, 497 P.2d 171, reinstated the injunction against Indian net fishing for steelhead trout.

This Court reversed. *Washington Game Department* v. *Puyallup Tribe*, 414 U.S. 44 (*Puyallup II*). Reviewing the validity of regulations of the Department of Game that banned net fishing for steelhead trout, the Court held those regulations invalid because they discriminated against the Indians. All

Indian net fishing being barred, the steelhead were being taken solely by hook and line fishing, which was entirely preempted by non-Indians. The Court observed that the State need not prohibit all net fishing but could make regulations fairly allocating the steelhead between Indians with nets and non-Indians, while still providing the number necessary for escapement. 414 U.S. at 48-49.

During this same period, two cases involving tribal fishing rights were proceeding in the federal courts. In *United States* v. *State of Washington*, 496 F.2d 620 (C.A. 9), certiorari denied, 419 U.S. 1032, the Court of Appeals for the Ninth Circuit held that, although ownership of the land had largely passed from Indian hands, the Puyallup Indian Reservation nonetheless continued in existence. As a result, the court indicated, tribal members had a continuing right to fish free from state interference on that portion of the Puyallup River lying within the reservation (*ibid.*).[2] That decision was rendered on April 30, 1974.

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[2] The court of appeals stated (496 F.2d at 620):

> This appeal presents for decision, a contention under which the appellee challenges the continued existence of the Puyallup Indian Reservation and, as a consequence, the right of the Puyallup Tribe of Indians to fish, free from state interference, on that part of the Puyallup River lying within the Reservation [footnote omitted].

The court then concluded, on the basis of *Mattz* v. *Arnett*, 412 U.S. 481, that "the Puyallup Indian Reservation continues to exist" (496 F.2d at 621).

The Puyallup Tribe and the State of Washington were also involved in litigation in the United States District Court for the Western District of Washington. *United States* v. *State of Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086. In that case, brought by the United States to require the State to observe fishing rights guaranteed by treaty to numerous tribes including the Puyallup Tribe, the district court held, *inter alia*, that on-reservation fishing is not subject to state regulation (384 F. Supp. at 341) and that the Tribes were entitled to an opportunity to catch 50 percent of the harvestable steelhead run off their reservations (384 F. Supp. at 343). The district court rendered its decision on February 12, 1974.[3]

On April 8, 1975, after these federal decisions had been handed down, the state superior court in the instant case issued its decision curtailing the Tribe's right to capture steelhead both on and off the Reservation. The court recognized, as had this Court in *Puyallup I*, that the Department of Game has the authority to regulate the off-reservation fishing activities of the Puyallup Tribe when such regulations are necessary for the purposes of conservation. The court further held, however, that it had jurisdiction to allocate the fishery of both hatchery and naturally propagated steelhead within the boundaries of the Reserva-

[3] The court of appeals affirmed on June 4, 1975, and then amended its opinion in part on July 23, 1975.

tion (Pet. App. C-47). As to the allocation question, the court found that the Puyallups are entitled to 45 percent of the harvestable natural steelhead run in the Puyallup River (not to exceed 3,280 steelhead per year) and that Indians within such limits are entitled to fish with nets and to sell the fish commercially (Pet. App. C-57 to C-58). The court held that the Tribe had no treaty right to hatchery produced steelhead released by the Department of Game (Pet. App. C-52).

The Supreme Court of Washington, with slight modifications, affirmed. The court first held that the state courts had jurisdiction to determine the extent of Indian exemption from state regulations due to overriding federal treaty rights and that it was not necessary to defer on that question to the federal courts (Pet. App. B-5 to B-8). The court then retreated from its earlier decision (in *Puyallup I*) recognizing an Indian net fishery as a matter of right under the Treaty of Medicine Creek and suggested that the finding should be re-examined by this Court as well (Pet. App. B-8 to B-32). Holding that the State Department of Game must exercise continuing jurisdiction over Indian steelhead fishing, the court ruled that, for purposes of conservation, regulations applicable equally to Indians and non-Indians may be imposed; that the State may not interfere with access by Indians to their usual and accustomed fishing places; that the award of 45 percent of the harvestable natural run as the extent of the Indians' treaty right was an equitable determination by the

trial court (Pet. App. B-40); and that hatchery-produced fish are not subject to Indian treaty fishing rights (Pet. App. B-33 to B-37).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Puyallup Indian Reservation, created by the Treaty of Medicine Creek (10 Stat. 1132), encompasses within its boundaries a portion of the Puyallup River. As this Court noted in *Puyallup I* (391 U.S. at 395), steelhead trout "come in from the ocean, pass through the salt water of Puget Sound, enter the fresh waters at the mouths of rivers [including the Puyallup River], and go up these rivers to spawn." As they proceed upriver to their spawning grounds, therefore, the steelhead trout pass through waters of the Puyallup River within the Puyallup Indian Reservation. This case involves the right of the Puyallup Indians to fish for such steelhead trout within their Reservation free of state regulation and control.

This case differs markedly from *Puyallup I* and *Puyallup II* in several respects. Salmon fishing, at issue in *Puyallup I* (but not *Puyallup II*), is not at issue here. Nor does this case involve, as did both *Puyallup I* and *Puyallup II*, regulation of fishing by individual tribal members outside the Reservation; the Tribe has challenged in its petition for certiorari only the regulation by the Department of Game of tribal fishing within the Puyallup Reservation. Indeed, the Department of Game named only the Tribe

and its Chairperson as defendants in the State Superior Court. In addition, important decisions in two federal cases, rendered after this Court's decision in *Puyallup II* and before the judgment of the Superior Court in this case, have affirmed the existence of the Puyallup Reservation and declared the Indians' right to fish on the Reservation without State interference.

It is the position of the United States that the Washington state courts improperly exercised jurisdiction over the Puyallup Tribe in this case and that, in any event, principles of collateral estoppel and *res judicata* barred the state courts from adjudicating the Tribe's right to fish on its Reservation. On the merits, we believe that the Tribe's right to fish on its Reservation has been preserved free from State regulation by the Treaty of Medicine Creek. Moreover, even if the Tribe were to exceed the rights granted by the Treaty, the State of Washington cannot govern the activities of the Tribe on its Reservation; the United States, in the exercise of its guardianship over the Indians, has that power and responsibility.

The sovereign immunity of the Puyallup Tribe protects it from suit at the behest of the Department of Game (*United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506). The present suit, unlike the underlying suits in *Puyallup I* and *Puyallup II*, is directed at the Tribe alone and does not concern off-reservation fishing activities by individual tribal members. The order of the State Superior Court im-

poses obligations and restrictions directly upon the Tribe, including a restriction on the number of steelhead trout that may be taken within the boundaries of the Puyallup Reservation. This order is incompatible with the immunity granted to the Tribe as a "dependent * * * sovereignt[y]" (*United States* v. *United States Fidelity & Guaranty Co., supra*, 309 U.S. at 512).

In any event, principles of *res judicata* and collateral estoppel bar relitigation of issues previously resolved by judgments in federal cases. The Court of Appeals for the Ninth Circuit has held that the Puyallup Reservation continues in existence and indicated that the Tribe is thus free to fish upon the Reservation without state interference (*United States* v. *State of Washington*, 496 F.2d 620, certiorari denied, 419 U.S. 1032). More importantly, the decision of the United States District Court for the Western District of Washington, in a case involving both the Puyallup Tribe and the Department of Game, established allocation formulas applicable to off-reservation fishing and concluded that tribal fishing on the Reservation was not subject to state regulation (*United States* v. *State of Washington*, 384 F. Supp. 312). The Court of Appeals for the Ninth Circuit affirmed that decision (520 F.2d 676), and this Court denied certiorari (423 U.S. 1086). Those judgments are binding upon the state courts under the Full Faith and Credit Clause and principles of *res judicata* and collateral estoppel.

The remand from this Court in *Puyallup II*, a case involving only off-reservation fishing by individual Indians, did not render these principles ineffective. The opinion of the Court in that case gives no indication that the state courts were to exercise jurisdiction over on-reservation fishing for steelhead trout regardless of intervening federal judgments. Nor does the presence of the plaintiff-intervenors call for a different outcome. To the extent that they did not have the opportunity to present arguments in the federal cases, their interests were amply represented by the State of Washington and the Department of Game.

For the foregoing reasons, we do not think it necessary for the Court to reach the merits of this case. Should it do so, we believe that Article II of the Treaty of Medicine Creek (10 Stat. 1132), setting apart Reservation lands for the "exclusive use" of the Indian tribes, preserved for the Puyallup Tribe the right to take fish upon the Reservation without regulation by the State. Given the importance of fishing rights to Indian tribes in 1854 (*Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 405-406) and the plentiful supply of fish at that time, the Puyallup Tribe can hardly be thought to have surrendered to future white settlers the power to regulate its fishing activities upon the Reservation. Although circumstances have changed significantly in the past 123 years, the State may not now limit by regulation the rights conferred to the Tribe by federal treaty.

The State of Washington has no inherent jurisdiction over the Puyallup Indians upon their Reservation (*Bryan* v. *Itasca County*, 426 U.S. 373, 376-377, n. 2). Although this Court has permitted limited exercise of state jurisdiction over matters involving Indians off their Reservation and over matters involving non-Indians, the activities in this case fall into neither category; rather, the State seeks to regulate tribal activity on the Reservation that it suspects may affect non-Indians outside the Reservation. This substantial interference with tribal sovereignty finds no warrant in the decisions of this Court.

The federal government, in the exercise of its plenary power over the Indian tribes, can oversee proper exercise of the Indians' treaty rights. And the State, of course, may reach an accommodation with the Tribe through appropriate bargaining. What the State may not do, in our view, is unilaterally to impose regulations on the Puyallup Tribe within the borders of its Reservation and thus make the Tribe's exercise of its treaty rights subject to continuing state control.

ARGUMENT

I. THE STATE SUPERIOR COURT LACKED JURISDICTION OVER THE PETITION FOR RELIEF BECAUSE OF THE SOVEREIGN IMMUNITY OF THE PUYALLUP TRIBE.

The Amended Petition for Declaratory Relief, filed by the Department of Game on January 9, 1974, following remand after the decision in *Puyallup II* (App. 3), names as defendants only the Puyallup

Tribe, Inc. and Ramona Bennett, Chairperson of the Tribal Council. The complaints filed by the plaintiffs-intervenors are directed to the same defendants. Not surprisingly, therefore, the relief awarded by the state superior court (and substantially affirmed by the Washington Supreme Court) generally runs against the Tribe: the Tribe is directed to submit a roll of authorized fishermen; the Tribe is required to report on a weekly basis the take of the Tribal members; and, most importantly, the take of the Tribe within the boundaries of its Reservation is limited by the allocation formula developed by the superior court. Moreover, the state courts have denied the Tribe and its members any right to take hatchery fish that pass through the Puyallup Reservation (Pet. App. E-2 to E-5).

The principle is well-established that Indian tribes enjoy sovereign immunity from suit absent a clear waiver. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506. Once themselves regarded as sovereign nations,[4] Indian tribes traditionally have been protected by principles of immunity similar to those applicable to the several States. See, *e.g.*, *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C.C.A. 8). Under normal circumstances, and without clear waiver, those principles would protect an Indian tribe from being haled into state court, at the behest of a state agency, and or-

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[4] See *Worcester* v. *Georgia*, 6 Pet. 515 (Marshall, C.J.); *United States* v. *Devonian Gas and Oil Co.*, 424 F.2d 464 (C.A. 2) (Friendly, J.).

dered to forego rights believed to have been secured in a treaty with the United States.

The Washington state courts in this case asserted jurisdiction over the Puyallup Tribe apparently upon two grounds.[5] First, the Washington Supreme Court (Pet. App. B-6) found persuasive the language of this Court in *Puyallup I*, rejecting a sovereign immunity defense: "This case, however, is a suit to enjoin violations of state law by individual tribal members fishing off the reservation. As such, it is analogous to prosecution of individual Indians for crimes committed off reservation lands, a matter for which there has been no grant of exclusive jurisdiction to federal courts" (391 U.S. at 397, n. 11). The present suit, however, as a reading of the petition for relief shows, is not "a suit to enjoin violations of state law by *individual* tribal members" (emphasis added), none of whom is named as a defendant in the petition, nor is it a suit involving only "fishing *off* the reservation" (emphasis added). Rather, the suit is directed in large part at controlling the activi-

[5] Although it does not appear that the Tribe raised the defense of tribal sovereign immunity in its answer, we believe that this defense, like the Eleventh Amendment defense, "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court" (*Edelman* v. *Jordan*, 415 U.S. 651, 678).

The Washington Supreme Court apparently assumed that the Tribe was subject to suit; the pertinent question in its view was whether federal treaty rights could be determined in State court (Pet. App. B-5). In this brief we discuss the positions taken by the Washington Supreme Court insofar as they may pertain to the issue of sovereign immunity as well.

ties of the Puyallup Tribe itself (and presumably its members at least indirectly) both off and on the Reservation in a manner not contemplated during the proceedings under review in *Puyallup I*.

The second basis for assuming jurisdiction over the Tribe was the remand from this Court in *Puyallup II*. But *Puyallup II*, like its predecessor, involved fishing by individual tribal members off the Reservation. Although the Tribe (as in *Puyallup I*) was named as a defendant, the sole question before this Court was the extent of off-reservation fishing rights exercisable by tribal members in common with non-treaty fisherman in Washington. Nothing in these prior cases placed obligations upon the Tribe itself or in any way restricted the right of the Tribe to conduct fishing operations within the confines of its Reservation.

The fact that individual fishing rights are generally derived from, and dependent on, tribal fishing rights is, under these circumstances, not relevant to the question of sovereign immunity. A State may sue individual tribal members to regulate their off-reservation conduct under non-discriminatory fishing regulations held necessary for conservation and compatible with Tribal treaty rights; but it does not follow that the Tribe itself must answer in State court for the extent of its on-reservation fishing and, in addition, submit lists and reports to assist state regulation off the Reservation. Whatever may be the obligation of individual Indians to respond to state process, the Tribes, as "dependent * * * sovereignties"

(*United States* v. *United States Fidelity & Guaranty Co.*, *supra*, 309 U.S. at 512), are not subject to suit at the behest of a State or private parties. Thus, the exercise of judicial power over the Tribe in this case is incompatible with recognized principles of Tribal sovereign immunity.

II. ESTABLISHED PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL BAR RELITIGATION OF THE PRINCIPAL ISSUES IN THIS CASE.

If the Tribe's immunity from suit did not bar the Washington state courts from deciding the scope of the Indians' fishing rights, we believe these issues are nevertheless foreclosed, under principles of collateral estoppel and *res judicata*, by the decision of the United States District Court for the Western District of Washington in *United States* v. *State of Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086.

Despite the complex history of this litigation, and the related federal litigation, the facts giving rise to application of principles of *res judicata* and collateral estoppel are relatively straightforward. On January 9, 1974, after the remand from this Court in *Puyallup II*, and the subsequent remand to the state superior court from the Washington Supreme Court, respondent Department of Game there filed an Amended Petition for Declaratory Relief. Shortly thereafter, on February 12, 1974, Federal District Judge Boldt entered his decision in *United States* v. *State of Washington*, *supra*, upholding the right of

the Puyallup Tribe to take 50 percent of the harvestable steelhead in off-reservation fishing sites recognized by the Treaty of Medicine Creek. Judge Boldt also held that fish taken by the Tribe on the reservation were not subject to regulation by the State and were not to be counted in the Tribe's specified share. On April 30, 1974, the Court of Appeals for the Ninth Circuit, in a separate federal case, agreed that the Puyallup Reservation continued in existence and that the Tribe had an exclusive right to take fish from waters within that Reservation. *United States* v. *State of Washington*, *supra*. Neither decision was thereafter disturbed in any way significant to the questions under consideration in the state courts.

The order of the state superior court in this case was not entered until April 8, 1975. The state superior court accepted the continued existence of the Puyallup Reservation (Pet. App. C-39) but declined in all other respects to accede to the results of the federal litigation.[6] The court, therefore, established

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[6] The defenses of *res judicata* and collateral estoppel, while perhaps not raised below with the greatest clarity, appear to have been sufficiently pleaded to impede further litigation on the matters in question. For example, Affirmative Defense I (App. 15) notes that the Ninth Circuit in *United States* v. *State of Washington*, 496 F.2d 620, certiorari denied, 419 U.S. 1032, had held that the Puyallup Reservation continued in existence and that the Tribe retained a "sole and exclusive right" to take steelhead on the Reservation. Affirmative Defense II (App. 15) cites to the district court opinion in *United States* v. *State of Washington*, 384 F. Supp. 312, affirmed, 520 F.2d 676 (C.A. 9), certiorari denied, 423 U.S. 1086, and states: "This decision affirms the right of the Puyallup Indian Tribe,

different allocation percentages and procedures and held that "the State can enforce reasonable restrictions on the commercial fishing of Indians even though the fish pass through a portion of the river that would be designated within the boundaries of an Indian Reservation" (Pet. App. C-51).

The state courts were not free to disregard the prior decisions of the federal courts on these matters. "Under the [Full Faith and Credit Clause] and 28 USC § 1738, which implements the Constitution and is broader in scope in some respects a valid judgment of one state must be given full faith and credit in the courts of another state and in the federal courts, and a valid federal judgment must be given full faith and credit in the state courts. Thus the doctrine of full faith and credit supports and

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under the Treaty of Medicine Creek, to share in the taking of 50% of the harvestable steelhead from the affected waters, exclusive of Puyallup tribal needs and on-reservation fishing." Although the answer speaks in terms of mootness (App. 15) and preemption (App. 16), the basis for claims of *res judicata* and collateral estoppel is set out in sufficient detail to provide the plaintiffs and the state court with notice of prior binding decisions. In fact, the trial judge explicitly rejected "the position that [he] was bound by Judge Boldt's decision" (Pet. App. C-30 to C-31).

Similarly, we believe that this issue is fairly raised by the Petition for Certiorari. The "Question Presented" (Pet. 2), though phrased in general terms, does challenge the right of the state courts to adjudicate on-reservation fishing rights, and the issue of collateral estoppel is specifically addressed in the petition (Pet. 31). This case does not, therefore, evidence "the practice of smuggling additional questions into a case after [the Court] grant[s] certiorari" (*Irvine* v. *California*, 347 U.S. 128, 129 (opinion of Jackson, J.)).

gives effect to the doctrine of res judicata, and accordingly 'the local doctrines of res judicata, speaking generally, become a part of national jurisprudence' [*Riley* v. *New York Trust Co.*, 315 U.S. 343, 349]." 1B Moore, Federal Practice, ¶ 0.406[1], pp. 901-903 (2d ed. 1974). See also *Stoll* v. *Gottlieb*, 305 U.S. 165; *Hancock National Bank* v. *Farnum*, 176 U.S. 640. Under principles of *res judicata*, "when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell* v. *County of Sac*, 94 U.S. 351, 352." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597. When a second suit, not yet brought to judgment, is for a different cause of action, principles of collateral estoppel dictate that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies * * *." *Southern Pacific Railroad Co.* v. *United States*, 168 U.S. 1, 48-49.

The Department of Game has had a full opportunity to litigate in the federal lawsuits the extent of its regulatory power over both on-reservation and off-reservation fishing by the Puyallup Indians. In the lawsuit before Judge Boldt, the parties uniformly agreed that the State lacked the power to

regulate on-reservation fishing.[7] The court then gave extensive consideration to the question of off-reservation and set forth principles of allocation that ensured full protection of the Indians' treaty rights. There is no indication that the materials before Judge Boldt were misleading or in any way deficient. The Department of Game is precluded, therefore, from relitigating those issues in a different forum.

For several reasons, we do not believe that the remand from this Court in *Puyallup II* was intended to, or did, supplant traditional principles of finality in litigation. To begin with, the question of regulating on-reservation fishing was never addressed in the prior *Puyallup* cases; as we have discussed (pp. 14-15, *supra*), those cases involved off-reservation fishing rights alone. Moreover, although the Washington Supreme Court stated that this Court "specifically remanded this case for a determination of a fair allocation that 'accommodate[s] the rights of Indians under the Treaty and the rights of other people.' See *Puyallup II* at 49," (Pet. App. B-6) the Court in *Puyallup II* did no more than to hold that the previous regulations of the Department of Game failed to protect the Indians' treaty rights. The Court did not direct the state courts or the Department of Game to devise allocation formulas but merely noted that the "aim" of any formula, or any other pro-

[7] Judge Boldt specifically noted: "All parties in this case agree that on reservation fishing is not subject to state regulation and no issue to the contrary is presented in this case" (384 F. Supp. at 341).

posed solution, must be the fair accommodation of competing interests in off-reservation fishing—a result since achieved in the federal litigation before Judge Boldt. Finally, at the time that this Court decided *Puyallup I*, the federal decisions later raised as a bar to further litigation of the same issues in *Puyallup III* had not yet been handed down. Under those circumstances, this Court hardly can have intended to invert the normal principles of *res judicata* and collateral estoppel and deny force to those federal decisions because of the expected pendency of further proceedings in state court.

Nor does the presence of the plaintiffs-intervenors [8] in this lawsuit make relitigation of these issues appropriate. Although neither intervenor was a party to the federal lawsuit before Judge Boldt, the Northwest Steelheaders did participate fully in briefing and argument before the court of appeals. This appearance was sufficient to allow meaningful presentation of its views, and the policies of judicial finality and freedom from vexatious and repetitive litigation argue in favor of barring reconsideration of identical issues in this lawsuit.

Moreover, the interests of all plaintiffs-intervenors were fully represented by the State in the federal litigation before Judge Boldt and intervenors would have benefitted from any judgment favorable to the State in that litigation. Although intervenors sug-

[8] Northwest Steelheaders Council of Trout Unlimited and Gary Ellis; and Western Steelheaders, Inc. (Pet. App. B-1).

gest that they are seeking a declaration of *personal* rights in the steelhead fishery, those rights, to the extent that they involve non-hatchery fish available for capture off the Reservation, can be no more than the right to fish *in common with* the Puyallup Indians—a right possessed by all citizens of the State subject to appropriate regulation. A judgment against the State affecting those fish, therefore, binds its citizens as well. See *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 340-341. To the extent that the rights claimed are in hatchery fish alone, because of license fees paid for their propagation, intervenors' interest is limited primarily to a matter not decided by the federal courts and not raised as a question presented in the petition here. Intervenors' interest is certainly not sufficient to justify the state courts' refusal to give full faith and credit to the lower federal courts' determination that the State may not regulate Tribal fishing on the reservation.

III. THE RIGHT OF THE PUYALLUP TRIBE TO FISH ON ITS RESERVATION WITHOUT STATE INTERFERENCE IS PRESERVED BY THE TREATY OF MEDICINE CREEK.

The Treaty of Medicine Creek, 10 Stat. 1132, between the United States and various Indian bands (including the Puyallup Tribe), provided that certain lands previously occupied by the Indians would be ceded to the United States for an agreed consideration. The same treaty also provided that specified tracts of land, including the present Puyallup Reservation, would be "reserved for the present use and

occupation of the said tribes and bands * * *." According to Article II of the Treaty, those tracts were to be "set apart, and, so far as necessary, surveyed and marked out for their *exclusive use*; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent" (emphasis added).

Article III of the Treaty, considered by this Court in *Puyallup I* and *Puyallup II*, supplemented the reservation fishing rights by providing: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory * * *." Article III conveyed no fishing rights on the Reservations to white settlers within the Territory; rather it reserved to the Indians their prior fishing rights in the ceded territory, now outside the Reservations, subject only to the qualification that they were no longer to be exclusive but to be exercised "in common with" other citizens. These rights were in addition to the rights reserved under Article II, not in derogation of them.

The principles to be applied in interpreting the provisions of this Treaty have been set forth in numerous prior decisions of this Court. "[T]he wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice." *Antoine* v. *Washington*, 420 U.S. 194, 199. "It is [the court's] responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council, and

in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people" (*Tulee* v. *Washington*, 315 U.S. 681, 684). " 'Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.' *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930)" (*McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174).

In light of these principles we believe that Article II of the Treaty of Medicine Creek provided for the Puyallup Tribe a Reservation on which its members were entitled to fish free from state interference. In 1854 fishing was generally an integral part of tribal life upon the Reservations (see *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 405-406); and Indians largely depended upon fish for their subsistence. "The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, which was 'not much less necessary to the existence of the Indians than the atmosphere they breathed' remained in them unless granted away. *United States* v. *Winans*, 198 U.S. 371." Op. Acting Sol. M. 28107, June 30, 1936, quoted in Department of Interior, *Federal Indian Law* 497 (1958). At that time, more than three decades before admission of the State of Washington to the Union, the Indians could not have expected that by agreeing to remove to a Reservation set apart for "their exclusive use," they had conferred upon future white settlers in the surrounding area

the power to limit the Indians' traditional fishing rights upon the Reservation. Rather the parties to the Treaty must have intended that the Indians could continue their tribal existence, as before, on the lands to which they were removed—that is, the Indians would be free to fish on their Reservation, subject only to the terms of the Treaty itself.

Indeed, the Supreme Court of Washington, without discussing Article II of the Treaty, lends support in its opinion to our position that the parties to the Treaty did not intend to limit traditional Indian fishing rights. Reviewing the historical background of the Treaty in its analysis of Article III, that court observed (Pet. App. B-22):

> [A]t the time of the Treaty in 1854, the parties did not contemplate the event of conservation requirements necessary to preserve the species. There was an inexhaustible supply of fish, see Uncommon Controversy, [Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians (A Report Prepared for the American Friends Service Commission] at 4 n. 3, 61-62, and the Treaty was undoubtedly premised on this condition.

In short, there was at that time no need to impose by treaty the limitations upon on-reservation fishing that the Department of Game now seeks to impose by enforcement of its regulations through the state courts.

We recognize, of course, that conditions today have changed. Expanding population, particularly non-Indian population, and the increased sophistica-

tion of fishing methods create demands on the supply of steelhead trout unforeseen in 1854. But the press of changed circumstances, without more, is not a sufficient reason for the State unilaterally to disregard or redraw Indian treaty rights without seeking legislation by Congress that takes into account the Indians' continuing interest and provides an appropriate consideration for any rights now modified. The treaty rights of the Indians, by virtue of the Supremacy Clause, are not subject to limitation by state legislation in that manner. *United States* v. *Pink*, 315 U.S. 203; *Santovincenzo* v. *Egan*, 284 U.S. 30. See also *Missouri v. Holland*, 252 U.S. 416; *Maiorano* v. *Baltimore & Ohio R.R. Co.*, 213 U.S. 268.

Although the matter is not strictly relevant to interpretation of the Treaty of Medicine Creek, we note that the concern expressed by the state superior court below—that the Indians would deplete the entire steelhead run by on-reservation fishing (Pet. App. C-40)—appears overstated. The Puyallup Indians have not sought at any time to capture all fish passing through the Reservation and the record does not support speculation that they intend to do so. Nor does this case present the question whether the Treaty of Medicine Creek could be interpreted consistently with the Indians' benefit to protect against total exhaustion of the fish supply. Moreover, Congress presumably retains the power to prevent abuse of the Indians' fishing rights if the need for such protection should arise.

IV. THE STATE OF WASHINGTON DOES NOT HAVE THE POWER TO REGULATE THE ON-RESERVATION FISHING ACTIVITIES OF THE PUYALLUP TRIBE.

Should the Court conclude that the Treaty of Medicine Creek does not reserve to the Puyallup Tribe unrestricted fishing rights on its Reservation, the Court would have to decide whether the State has the power to exercise jurisdiction over the on-reservation fishing activities at issue in this case. We believe the State does not have such power.

The State of Washington, like other States, has no inherent general jurisdiction over Indian activities occurring within the boundaries of an Indian reservation. See *Bryan* v. *Itasca County, supra*, 426 U.S. at 376-377, n. 2.[9] To the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice* v. *Olson*, 324 U.S. 786, 789. As this Court recently stated in *McClanahan* v. *Arizona State Tax Commission*, *supra*, 411 U.S. at 168:

> This policy was first articulated by this Court 141 years ago when Mr. Chief Justice Marshall held that Indian nations were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boun-

[9] Nor has Washington acquired jurisdiction under Public Law 280, 28 U.S.C. 1360, over criminal and civil matters affecting the Puyallup Indians. We do not address the question whether Public Law 280, if applicable, would permit regulation of on-reservation fishing activities by the Puyallup Tribe.

daries, which is not only acknowledged but guarantied by the United States." *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832). It followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries.

The doctrine of tribal immunity from state jurisdiction, which has served as well as a "backdrop" for the doctrine of federal preemption, *McClanahan*, *supra*, 411 U.S. at 172; *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 376-377, n. 2, is not absolutely rigid. The Court has permitted a narrow exercise of state jurisdiction over matters involving Indians separate and apart from the reservation and over matters involving non-Indians. *McClanahan*, *supra*, 411 U.S. at 171; *Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 480-481. Modification of the doctrine has occurred, however, only "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized" (*Williams* v. *Lee*, 358 U.S. 217, 219). The pivotal consideration in those cases has been defined as "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 220; *Fisher* v. *District Court*, 424 U.S. 382, 386) or whether the state action would "interfere with reservation self-government or would impair a right granted or reserved by federal law" (*Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148.

This case involves neither the conduct of non-Indians upon reservation lands nor the conduct of Indians off reservation lands.[10] The State of Washington instead seeks to extend its regulatory powers onto the Reservation, to control the activities of the Tribe and its members, because it believes those activities may have an adverse impact on non-Indians outside the Reservation. The state superior court has issued an opinion prohibiting certain fishing practices conducted solely within the reservation boundaries; that opinion presumably may be enforced by contempt proceedings. Thus, the potential interference with tribal sovereignty, and with plenary federal control over Indian affairs (*Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476), is both direct and considerable.

The fact that the Puyallup Tribe might be taking fish on its Reservation in excess of the rights preserved by the Treaty of Medicine Creek would not in itself justify interference by the State. In our view, the doctrines of sovereign immunity and federal preemption do not serve only to protect the Indians from state regulation of lawful activity. Rather, they rest upon the premise that unauthorized entry onto reservation lands by State officials, whether to enforce state or federal laws, is inconsistent with both the independent status of Indian tribes and the primary responsibility of the federal government over Indian affairs.

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[10] In *Puyallup I* and *Puyallup II*, the State sought to regulate the conduct of Indians fishing off the Reservation.

Although we are not prepared at this time to say that a State may never seek to regulate Indian practices upon a Reservation, regardless of the effect on citizens outside the Reservation, the circumstances of this case do not call for even a narrow exception to the tradition of noninterference. As yet, the citizens of the State of Washington have suffered no serious deprivations from the exercise of fishing rights by the Puyallup Tribe; thus, the State is not acting under narrowly circumscribed powers to moderate a situation of emergency. The record does not show that the State will be unable to provide an adequate supply of fish for its sport and commercial fishermen unless it reaches its regulatory arm onto the Puyallup Reservation. Moreover, the State has had a full opportunity to argue its position in federal court in a lawsuit to which the United States, as well as the Puyallup Tribe, is a party. Should the Puyallup Tribe fail to comply with the terms of the judgment in that case, federal enforcement may be available. And Congress, of course, remains free to enact federal legislation to remedy any difficulties that actually arise.

Even if the State's efforts at on-reservation regulation are viewed in terms of the existing narrow exceptions to the policy of noninterference (p. 28, *supra*), the regulation is not justified. The right to fish upon a Reservation is a right long associated with tribal existence. Although it may no longer be true that exercise of the right is "not much less necessary to the existence of the Indians than the atmos-

phere they breathed," *United States* v. *Winans*, 198 U.S. 371, 381, the record indicates that fishing plays an important role in the economic preservation of the Puyallup Tribe. In fact, fishing rights are about all the Tribe has retained, as the bulk of its lands were sold. To cut back these rights, as the State would do, would cause a significant hardship to the Tribe and its members.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted.

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